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No. 80-1765

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN SOCIETY OF
MECHANICAL ENGINEERS, INC.,
*Petitioner*

v.

HYDROLEVEL CORPORATION,
*Respondent*

**On Writ of Certiorari To The United States Court of Appeals For The Second Circuit**

## BRIEF OF THE NATIONAL FIRE PROTECTION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AMERICAN SOCIETY OF MECHANICAL ENGINEERS

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## INTEREST OF THE NATIONAL FIRE PROTECTION ASSOCIATION AS AMICUS

The National Fire Protection Association (hereinafter "NFPA") is a not-for-profit educational, voluntary membership organization dedicated to the protection of liability and property from fire. By consent of the parties NFPA respectfully submits this brief as Amicus Curiae, urging that the Supreme Court reverse the unprecedented and erroneous vicarious liability standard adopted below by the Second Circuit.[1]

[1] The opinion below acknowledges that it adopts a theory of liability which was not presented to the jury. 635 F.2d 118, at 124.

Founded in 1896, NFPA draws its approximately 32,000 members from all segments of society including professional firefighters, educators, businessmen, architects, engineers, and other members of the public interested in fire safety.[2] NFPA is truly an international organization attracting members from across the United States and Canada and from 85 other countries. The principal goal of NFPA is to protect man and his environment from fire by serving as a catalyst to identify and address fire safety issues.

The activities of NFPA in furtherance of this mission consist primarily of educational programs and technical standards development. NFPA's technical standards activity involves the development, publication and dissemination of current consensus standards intended to minimize the possibility of fire and the risks to life and property associated with fire in contemporary society. NFPA's educational efforts are directed to general public of all ages to educate them to avoid loss of life and property from fire by making good fire safety habits a way of life.

Through its 167 volunteer technical committees NFPA develops and continually updates[3] approximately 240 codes[4] and product standards[5] encompassing virtually every aspect of fire safety and fire protection. Because they represent the collective efforts of experts in many fields and are technically accurate, many of the standards and codes developed by NFPA are adopted directly into law or serve as a model for laws on the federal, state, and local level. Many businesses and industries voluntarily follow NFPA fire safety standards for internal fire safety protection. NFPA fire safety standards are also used extensively by insurance authorities for risk evaluation and premium rating purposes.

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[2] See graph Appendix I.

[3] Such updating is a continuous process which guarantees that the fire safety standards incorporate the most recent technological developments.

[4] The best known of the NFPA codes are the Life Safety Code and the National Electrical Code.

[5] A standard is a technical document which generally provides safety or performance specifications for a particular product or class of products.

The effect of these codes and standards can be seen everywhere. Smoke detectors in homes, protective clothing for firefighters and fire safety features incorporated in public buildings, such as fire extinguishers, sprinklers, illuminated exit signs, and stairway fire doors are some of the more visible results.[6] Less visible areas addressed by NFPA codes and standards include hazardous materials transportation, flammable liquid storage, electrical wiring and firefighter qualifications.

NFPA's standards development has always been dependent upon the work of volunteers. Approximately 2,400 experts from business, industry, government, educational institutions and the general public volunteer their time. Through the coordinated efforts of these volunteers on the 167 NFPA Technical Committees, the 240 NFPA sponsored codes and standards are continually updated and kept current and meaningful.

Representation on the technical committees of many divergent interests and points of view serves to ensure that no one interest group can dominate or unduly influence a committee. The standards development process is completely open—such that any interested person may propose, or comment upon the adoption, modification, or withdrawal of any NFPA standard. These technical committee activities are conducted according to a detailed set of published official NFPA procedures.

The expertise and technical know-how that these 2,400 volunteers collectively are able to focus on fire safety and fire protection problems are a valuable resource. NFPA's standards process could not function effectively without the countless thousands of hours donated by these volunteers.

Hydrolevel's antitrust claims arise from the issuance of a single, interpretative letter concerning whether the incorporation of a time delay mechanism in a low-water boiler cut-off was acceptable under ASME's Boiler and Pressure

[6] Many municipal and county ordinances concerning fire safety measures for public buildings are taken practically verbatim from NFPA maintained codes and standards.

Vessel Code. Similar to ASME, an important component of NFPA's standards activities is providing technical advisory services, both formally and informally, to anyone with a legitimate concern. Through this service even persons with no special skills or expertise can utilize NFPA's fire safety codes and standards.

The theory of liability espoused by the opinion below imposes treble damage liability upon a voluntary standards developing organization based solely on the acts of disloyal volunteers, whose purposes are wholly contrary to those of the non-profit organization. Such liability against the non-profit organization is wholly unnecessary where, as in the case at bar the corporate employers of the disloyal volunteers, James and Hardin, were liable for the damages, if any, sustained by Hydrolevel Corporation. In practical terms the non-profit standards organization becomes an insurer against the unauthorized disloyal acts of a volunteer member, even though it had no knowledge of the unlawful acts and did not authorize or ratify them. Indeed, ASME corrected the wrongful acts promptly after learning of them. The standard of liability adopted by the decision below threatens the structural underpinnings of the voluntary standards development process—reliance upon volunteer committee members and their technical expertise.

If the opinion below is permitted to stand, it will imperil the ability of NFPA and virtually every other major standards developing organization to function effectively. At a minimum this new vicarious liability standard will greatly increase the cost and length of time necessary to maintain and interpret safety and performance standards. Many volunteers will choose not to serve rather than be burdened by the additional layers of procedural restraints that the decision below seems to contemplate. As a result, many organizations may be forced curtail their standards activities, especially the practice of providing technical and interpretative advice upon request from interested persons. Thus, the Court's decision in this case will have a broad direct impact upon the entire standards developing community—including NFPA.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This action was originally commenced against three defendants, including ASME, alleging a conspiracy to restrain trade or to monopolize in violation of Sections 1 and 2 of the Sherman Act, 15 USC §§ 1 and 2. ASME is a non-profit tax-exempt scientific membership society which develops voluntary performance and safety standards. Prior to trial, plaintiff settled with corporate defendants McDonnell-Miller Corporation[7] (hereinafter "M&M") and Hartford Steam Boiler Inspection and Insurance Company (hereinafter "Hartford") for $725,000 and $75,000 respectively.

ASME was sued based on the issuance and subsequent misuse by salesmen of M&M, of a single letter interpreting a section of ASME's Boiler and Pressure Vessel Code. This letter, dated April 29, 1971, was drafted by T.R. Hardin as chairman of the relevant subcommittee, in response to a letter of inquiry. Unknown to ASME, Hardin and John James, another volunteer committee member, had drafted the original inquiry. Neither the inquiry letter, nor the interpretation letter mentioned either Hydrolevel or its product. Hardin and James intended to use the ensuing response, as drafted by Hardin, to the advantage of M&M and Hartford, their employers. Subsequently, M&M and its sales personnel misrepresented the letter to potential purchasers claiming that Hydrolevel's product, which had a time delay mechanism, did not meet the relevant safety standard.

The case went to trial with ASME as the lone defendant. At the conclusion of the evidence the trial judge held that the evidence was insufficient to find ASME liable as an active participant in the alleged conspiracy.[8] The case went to the jury

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[7] M&M is an operating division of International Telephone and Telegraph Corporation (IT&T).

[8] The decision of the Second Circuit attempts to sidestep the trial judge's amply supported finding on this issue. Ignoring eighty years of prior Sherman Act precedent, the Second Circuit relied upon a misconstruction of the Restatement Second of Agency and upon *Gleason v. Seaboard Air Line Railway Co.*, 278 U.S. 349 (1929). (Common carrier held liable for misrepresentation concerning a bill of lading made by its employee.) Extension of liability to the non-profit standards organization under the Second Circuit's novel "unintentional participation" theory is wholly unnecessary because the true principals of the disloyal volunteers, M&M and Hartford, were liable for the damages, if any, sustained by Hydrolevel.

solely on the alternate theory that ASME may have acquiesced in, or ratified, the illegal acts in furtherance of the conspiracy. The jury returned a verdict against ASME in the amount of $3.3 million dollars prior to trebling.

On appeal ASME's principal contention was that the facts adduced at trial failed to show that it had knowingly and intentionally participated in the conspiracy or ratified the unauthorized actions of two volunteers. ASME also contended that volunteers James and Hardin did not intend to benefit ASME and therefore could not properly be "agents" of ASME in carrying out this scheme. Logically James and Hardin could not have intended to benefit ASME through their actions, rather they sought to benefit M&M and Hartford.

The panel chose to sidestep the arguments raised by ASME[9], and instead adopted a wholly new and unprecedented standard of liability premised on "apparent authority". Thus the liability of ASME was sustained on a theory that was never considered by the jury. 635 F.2d 118, at 124. The concept of "apparent authority" of an agent was transplanted and applied as the standard for measuring whether ASME had "unintentionally participated" in the antitrust conspiracy alleged by Hydrolevel.

The opinion below strongly suggests that ASME was held liable on a negligence or quasi-negligence standard for failure to exercise due care in supervising Hardin and James. The panel stated:

> Imposing liability on the principal [ASME] will induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance—a consideration of great importance in cases such as this where misuse of quasi-official standards and codes can so easily injure competitors. 635 F.2d 118, at 125.

Under the terms of the Sherman Act a conspiracy to restrain trade or to monopolize requires a deliberate and intentional commitment to a common plan, scheme or end.

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[9] One can surmise that the panel choose this course because the record was, as ASME had argued, insufficient to support a finding of liability without stretching to discover this new liability standard.

This Court has held on numerous occasions that participation in a Section 1 or 2 conspiracy requires a showing of deliberate and intentional participation in the conspiracy.[10] Absent such a showing judgment must be entered for the defendant as a matter of law.

Prior to the decision below no federal decision had ever held a defendant liable for "unintentional participation" in a Section 1 or 2 conspiracy. Indeed the "apparent authority" doctrine had been expressly rejected as inconsistent with the policies and purposes of Sections 1 and 2 of the Sherman Act.[11]

Noticeably absent from the decision below is citation of even a single antitrust decision on this issue. Perhaps the most troubling aspect of the decision below is the adoption of the "apparent authority" standard despite the lack of any reliance by the plaintiff. Such reliance is the genesis of the "apparent authority" doctrine as applied to intentional torts. Yet, it has never been suggested that Hydrolevel relied upon the authority of James and Hardin to act on behalf of ASME.

The decision below is a fundamental deviation from the principles governing participation in a conspiracy to restrain trade or monopolize. One can not be held liable for participation in Section 1 or 2 conspiracy without an intent to act jointly and at a minimum some knowledge of the illicit purposes of the conspiracy.[12] The panel has departed from this long established rule of law. In the process it creates an unwise and unsound new standard of antitrust liability. The Court should reverse the decision below which predicates Sherman Act liability of a non-profit standards organization upon "apparent authority" of two disloyal volunteer committee members.

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[10] *See e.g.*, American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946) and United States v. United States Gypsum Co., 438 U.S. 422, 443 n. 20 (1978).

[11] *See* United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344, 395 (1922); Truck Driver's Local No. 421 v. United States, 128 F.2d 227, 235 (8th Cir. 1942); and United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972).

[12] American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946); United States v. General Motors Corp., 384 U.S. 127, 143 (1966); and United States v. United States Gypsum Co., 438 U.S. 422, 433 (1978).

## ARGUMENT

### I. THE PANEL'S DECISION EXTENDING VICARIOUS ANTITRUST LIABILITY BASED ON "APPARENT AUTHORITY" IS WHOLLY UNPRECEDENTED AND UNWARRANTED.

Sections 1 and 2 of the Sherman Act are designed to protect the natural balance of competitive forces in the marketplace. Protection and preservation of competition, not specific competitors, is the underlying goal. Hydrolevel's principal claim in this action was that issuance of the letter of April 29, 1971 and the subsequent misrepresentations thereof by M&M and its salesmen constituted a conspiracy in restraint of trade or to monopolize the low-water boiler cut-off market.

Under either §1 or §2 this Court has repeatedly required that a plaintiff demonstrate an intentional purposeful agreement among the alleged co-conspirators. *United States v. United States Gypsum*, 438 U.S. 422, 443 (1978) and *United States v. General Motors Corp.*, 384 U.S. 127, 143 (1966). The decision below stands in stark contrast to these precedents explicitly premising its conclusion concerning liability upon unintentional participation based on the disloyal acts of volunteers James and Hardin. 635 F.2d 118, 124-125.

The panel concluded that ASME was responsible in damages based on involvement of James and Hardin in the conspiracy alleged by Hydrolevel. Under the panel's analysis it did not matter that:

> (1) the organization was without knowledge of the real motives and purposes of James and Hardin;
>
> (2) the conspiracy was not intended to benefit the organization; and
>
> (3) the organization was actively deceived by James and Hardin to benefit their actual principals.[13]

The panel's resolution of the liability issue charts an entirely new course for determining vicarious antitrust liability.

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[13] In this context, their employers M&M and Hartford.

The element of knowing intentional participation in the conspiracy to restrain trade or to monopolize is discarded. The panel substitutes a far different "apparent authority" standard which supplants the requirement of knowing and intentional participation. In adopting this standard the panel strains to analogize the conduct of James, Hardin and their co-conspirators to certain intentional torts. Under this analysis the panel concludes that the "apparent authority" standard controls on the facts of this case because Hardin's "conduct here was essentially a fraud, a willful knowing misrepresentation of the Code." 635 F.2d 118, at 125.

This novel and wholly inappropriate standard permits ASME to be held liable without regard for its lack of knowledge of, or participation in, the conspiracy alleged. The acts of two disloyal volunteers, who purposely deceived the organization to further the business interests of M&M and Hartford, are imputed to ASME. Application of this common law intentional tort standard is both erroneous and unprecedented.[14]

In reaching its conclusion the panel ignored a long standing principle of agency law that authority for an agent to commit criminal or tortious acts is not to be readily inferred.[15] This principle was recognized and applied in *U.S. v. Ward Baking.* The *Ward Baking Court* held for the defendant in a civil action brought by the government under the Sherman Act. The court held there was insufficient proof that "an agent of the defendant who had authority to bind it participated in any way in the conspiracy... or ratified such participation." 243 F.Supp. 713, at 717 (E.D. Pa. 1965).

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[14] *See e.g., Radiant Burner, Inc., v. Peoples Gas Light and Coke Co.*, 364 U.S. 656 (1961).

[15] The Restatement Second of Agency §34, comment (g) articulates this principle as follows:

Illegal acts. Authority to do illegal or tortious acts, whether or not criminal, is not readily inferred. Thus, the appointment of a person to act as manager does not thereby give him authority to make trade agreements as opposed to public policy that they will not be enforced, or to inaugurate illegal blacklists or boycotts, or to make fraudulent statements concerning his principal's goods.

Under this principle a non-profit standards organization, such as ASME, should not be liable unless it ratified, with full knowledge of the material facts, the acts of Hardin and James or unless Hardin and James intended to benefit ASME by their activities. The Restatement Second of Agency §§173, 235 and 236. Unless either of these tests can be satisfied ASME cannot properly be held liable. The decision below is directly contrary to this principle as relied upon in *Ward Baking, id.*

Similar to the case at bar, plaintiff in *Structural Laminates, Inc. v. Douglas Fir Plywood Association,* 261 F. Supp. 154 (D. Ore. 1966), sought treble damages alleged to arise from the exclusion by means of a voluntary product standard of a new product with a revolutionary design. Plaintiff plywood producer alleged that its innovative design for 3-ply half inch plywood was unlawfully excluded from the market by means of defendant's product standard.[16] Plaintiff urged that treble damages should be assessed regardless of whether the defendant voluntary association was found to have any unlawful intent or purpose. The trial court rejected this theory concluded:

> Absent a bad purpose what was defendant's antitrust liability? It was responsible for the commercial standards which did affect adversely the marketing of plaintiff's product. Plaintiff's 3-ply ½" was suitable for inclusion in the commercial standards, but 3-ply ½" plywood did bear a poor reputation in the industry in 1958. Had defendant been vigilant, it might have concluded in 1958, or sooner, what it did conclude in 1962—that the bad reputation was unjustified.
>
> If intent and purpose are factors in the anti-trust law, and the court believes they are except where *per se* violations are involved, then the mere failure of one who is responsible for the adoption of a commercial standard to appreciate changes which make that

[16] Plaintiff there alleged that his product was wrongfully refused certification under the existing standard which called for use of *more than* 3-plys (layers) in half-inch plywood.

> standard obsolete and to take immediate and effective action to alter it, does not amount to a conspiracy to restrain trade. Any system of standards presupposes that there are standard and non-standard items. Those who produce products which are not standard are to some extent penalized and trade is to some extent restrained. This much however is congressionally sanctioned and the court is of the opinion that in the absence of a bad purpose, mistakes made in the formulation or maintenance of standards do not subject the one making the mistake to anti-trust liability. (Footnotes omitted). 261 F.Supp. at 159.

Other federal decisions concerning alleged antitrust violations for standards developing activities have applied a similar liability test. *See e.g., Radiant Burners Inc. v. Peoples Gas Light and Coke Co.*, 364 U.S. 656 (1961); *Eliason Corp., v. National Sanitation Foundation*, 614 F.2d 126 (6th Cir. 1980); *cert. denied*, 49 USLW 3246 (October 7, 1980); and *Roofire Alarm Co. v. Royal Indemnity Co.*, 202 F.Supp. 166 (E.D. Tenn. 1962), *aff'd* 313 F.2d 635 (6th Cir. 1963), *cert. denied*, 373 U.S. 949 (1963). This conclusion is also implicit in this court's decision in *Coronado Coal v. United Mine Workers of America*, 268 U.S. 295 304 (1925). *Coronado Coal, id.*, squarely rejects the theory of "apparent authority" for purposes of imputing vicarious anti-trust liability.[17] The concept of reliance upon which such theory is predicated has no relevance to these facts or to the policies of protecting and preserving competition embodied in the Sherman Act.[18] *Accord, Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc. 429 U.S. 477, at 488 (1977), citing with approval, Brown Shoe Co. v. United States*, 370 U.S. 294, at 320 (1962).

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[17] For further discussion see ASME's Petition For Certiorari at 12-14. *See also*, Truck Drivers' Local No. 421 v. United States, *supra*, at 235.

[18] The element of reliance has no application to the policies embodied in the federal antitrust statutes, since such statutes protect competition and the natural functioning of the marketplace, not individual competitors. Brown Shoe Co. v. United States 370 U.S. 294, at 320 (1962).

## II. THE PANEL'S DECISION WILL HAVE DEVASTATING CONSEQUENCES ON VOLUNTARY STANDARDS SETTING ORGANIZATIONS AND THE AVAILABILITY OF CURRENT, TECHNICALLY ACCURATE PRODUCT PERFORMANCE AND SAFETY STANDARDS

Voluntary product and safety standards and codes have been an integral part of the American economy for over a hundred years.[19] These standards are technical documents covering the essential safety and performance characteristics of a particular class of products. Standards such as those developed and maintained by NFPA represent the distillation of currently available technical information concerning the characteristics of the product. The utility of a standard is that it provides a yardstick for reliable judgments concerning a product's characteristics and performance vis-a-vis similar products.

Based on their proven reliability, these standards are adopted into state, county and municipal ordinances, regulations and building codes.[20] Many segments of business and industry rely upon these standards to make informed decisions regarding product characteristics and suitability.

The National Bureau of Standards has identified over 400 educational, scientific, technical or other non-profit organizations that are involved in developing product and safety standards. These organizations range from organizations, such

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[19] ASME was founded in 1880, NFPA was founded in 1896.

[20] In recognition of their importance the federal government has adopted a strong federal policy of encouraging and fostering private organizations to develop and maintain product safety and performance standards which is embodied in Office of Management and Budget Circular No. A-119, 45 Fed. Reg. 4326 (January 21, 1980). The circular specifically encourages the participation by government employees as volunteers on standards writing technical committees. The circular also encourages executive branch agencies to rely upon these voluntary product standards for procurement and regulatory purposes, whenever appropriate. The circular states: "Federal participation in the standards-related activities of these voluntary bodies provides incentives and opportunities to establish standards to serve national needs." OMB Circular No. A-119, at 4326.

as NFPA, who develops and maintains standards for a broad spectrum of fire safety and protection needs, to organizations which develop and maintain standards for a single product or category of products.[21]

Voluntary standards organizations serve the public interest channeling billions of dollars worth of volunteer manpower and expertise to the public good. Through the efforts of these organizations the quality of life is enhanced by greater availability of information on product safety and product performance. These organizations must rely upon thousands of individual volunteers to donate their time and expertise to serve on standards technical committees.[22]

The liability standard adopted by the decision below confers the status of insurer for all acts of their volunteer committee members upon these non-profit organizations. The loosely defined concept of "apparent authority" creates innumerable potential plaintiff's actions. Such liability will attach even where, as on the present facts, the volunteers act solely to benefit a third party and deceive the standards organization to benefit themselves and such third party.

The panel's proferred solution of additional review procedures is unworkable. It is extremely unlikely that additional review procedures, no matter how well conceived, will effectively combat the rare situation where volunteers on a committee actively conspire to deceive the standards organization to benefit their employer. The inherent delays and additional procedures will discourage many volunteers from continued service on such committees.

Without exception the major standards developing organizations, such as ASME and NFPA, rely upon committees comprised of volunteers to develop, maintain, and interpret product performance and safety standards. The efforts of these volunteers and knowledge and expertise they possess is vital to the effective functioning of the voluntary standards process.

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[21] For example, the Association of Home Appliance Manufacturers and the Tile Council of America.

[22] NFPA currently has 2,400 such volunteers, ASME has more than ten thousand.

Inasmuch as standards are technical documents, requests for interpretation or informal guidance are routinely received and processed. This interface between the standards organizations and those who utilize and rely upon their standards is ordinarily handled by the volunteers on the relevant technical committee. Responses to these requests provide valuable and often essential information to prospective product users. The interpretation process was supervised by ASME in a reasonable fashion under applicable ASME procedures.[23] ASME handles between 20,000 and 30,000 inquiries under these procedures annually.

The decision below betrays a fundamental misconception of the nature of the April 29, 1971 letter. The process of responding to requests for interpretation, clarification, or guidance concerning the technical requirements or language of a performance or safety standard must be distinguished from the procedures for certifying that a specific product complies with the relevant standards. This formal certification process is routinely handled by an independent body such as a testing laboratory, rather than by the standards body or an affiliated organization. The letter of April 29, 1971 resulted from a request for guidance concerning §HG-605 of the Boiler and Pressure Vessel Code,[24] *not* from a request as to whether Hydrolevel's product either was or could be certified as complying with the low-water fuel cut-off standard.

The decision below does not take account of this crucial distinction. The panel states:

> Absent some internal review procedures, no individual should be empowered to rule dispositively on the

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[23] The inquiry letter from M&M was, in accordance with official ASME procedures, referred by the staff secretary of the Boiler and Pressure Vessel Committee to Hardin, the Chairman of the subcommittee responsible for § HG-605 of the Boiler and Pressure Vessel Code. Hardin drafted a reply to the abstract technical inquiry posited by M&M's letter. This draft was reviewed by the Chairman and Vice-Chairman of the full Boiler and Pressure Vessel Committee. Only then was the April 29, 1971 reply letter issued as an unofficial communication on the issues raised by M&M's inquiry letter. See ASME's Petition for certiorari at 5.

[24] Based upon their knowledge of the relevant ASME procedures for processing interpretative requests, James and Hardin were able to circumvent and subvert this process to further the business interests of M&M and Hartford.

> fitness of a competitor's product. When an organization has placed a person in a position to do what Hardin did, without check or supervision, it must bear the consequences. 635 F.2d 118, at 126 (1980).

Contrary to the panel's suggestion ASME was neither negligent nor otherwise culpable based on the issuance of the April 29, 1971 letter. While the second paragraph of the letter is somewhat of a nonsequitur, it is a technically correct statement based upon the positioning of low-water fuel cut-off probe which is assumed in the inquiry letter. The damages, if any, suffered by Hydrolevel flow from the misrepresentations made by M&M and its salesman concerning the content and import of the letter. The panel erroneously assumes that closer supervision over ten thousand ASME volunteers could have precluded the issuance of the April 29, 1971 letter and the subsequent misrepresentation by M&M and its employees and salesmen. 635 F.2d 118, 126 (1980).

Absent some credible reason to suspect that the original request was contrived or without knowledge of the complicity ASME volunteers on the relevant subcommittee, no set of procedural safeguards would have aborted the conspirators' scheme to deceive ASME.

If left undisturbed the decision below will have a severe adverse impact on the ability of all standards developing organizations to recruit highly qualified volunteers to staff their technical committees. The additional commitment of time and resources to install additional procedures and litigate potential claims under the newly espoused "apparent authority" or "unintentional participation" theory will have no offsetting practical benefits. The prohibitions of §1 and §2 of the Sherman Act were never intended to reach unintentional conduct. *Accord, United States v. Aluminum Co. of America* 148 F.2d 416, 429 (2nd Cir. 1945). This Court should reverse the decision below and return the determination of antitrust liability to its proper moorings.

## CONCLUSION

The decision of the Second Circuit should be reversed and the complaint dismissed.

Respectfully submitted,

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## APPENDIX I

### NFPA's MEMBERSHIP COMPOSITION